No. 8352

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MRS. AH FOOK CHANG, alias Kam Yuen, and ROBERT CHANG, alias Yuk Moon,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

We have carefully considered the opinion rendered in this case by the learned Circuit Court. We have reached the conclusion that it is erroneous, particularly in its treatment of the subject of the presumption of error in connection with criminal appeals. In our opinion the language used by the majority of the court in considering this topic is inconsistent with numerous prior opinions rendered in this circuit. We are also of the opinion that the Court fell into error when it reversed the judgment of the Court below in the absence of any proper objection or exception to the instruction complained of, and also

that the Court erred in reversing the judgment in the absence of any showing of prejudice suffered by appellants.

It will be recalled that this Court has reversed the judgment rendered in the trial Court upon two grounds. The first ground was that the appellants were not personally present at the time of the conference between the foreman of the jury and the judge which occurred in the presence of the attorneys for both parties. The second ground for reversal was that at that conference the Court communicated with and instructed the foreman as the representative of the whole jury. The learned Circuit Court held that this action of the trial Court constituted error and that the Appellate Court *must presume that such error was prejudicial.*

We respectfully submit that under the facts presented such conclusion is untenable and inconsistent with numerous prior rulings of this Court.

In order that our position may be perfectly clear we call attention to the circumstances that occurred as shown by the record. While the jury was deliberating the foreman came to the chambers of the presiding judge and in the presence of the attorney for the appellants, and in the presence of the Assistant United States Attorney, who was trying the case for the Government, informed the Judge that the jury wished to be advised if the confession of one defendant in the case could be considered as evidence against the other. The Court thereupon informed the foreman in the presence of both of the attorneys mentioned, that

the confession made by one defendant in the case could be considered by the jury as evidence against the other defendant. The Court also refused to give the instruction asked for by appellants' attorney that a confession in the case was only evidence against the party making it, notwithstanding that a co-defendant was present when the confession was being made. This Court held that under the circumstances as shown by the evidence the instruction requested by appellants' attorney was erroneous. (Op. p. 5.) On the trial of the case, when the confession of Mrs. Chang had been offered in evidence, defendants' counsel had asked the Court to instruct the jury that any statements made by Mrs. Chang were not binding upon her co-defendant, Robert Chang. The Court at that time inquired whether or not the latter defendant was present and was informed that he was present at the time the confession was made. The Court thereupon refused to instruct the jury as asked, to the effect that Robert Chang was not bound by Mrs. Chang's confession. (R. pp. 151-152.) It appears then that what the Court did when the foreman appeared in his chambers and asked for advice was merely to reiterate an instruction that it had theretofore given to the jury as a whole. This Court, in its opinion states (p. 7), that "no one knows what the foreman told the rest of the jury. If he repeated correctly the judge's instruction the error would not be prejudicial. If he did not, the error *may* have been prejudicial. *We must presume it prejudicial.*" In other words, the Court holds that it must be presumed that a correct instruction, entirely consistent with the instructions given to the jury as a

whole, was incorrectly reported by the foreman to the jury. We submit that there is no justification in the law, statutory or otherwise, for such a holding, and that it is entirely out of line with all of the decisions of this circuit and with the whole line of decisions that obtain in many other circuits.

There are two lines of authorities dealing with this subject of what may be called presumed injury resulting from error. The subject is considered, this Court will recall, in the case of

Little v. U. S., 73 F. (2d) 861,

decided by the Tenth Circuit Court of Appeals and cited by this Court in the instant case. This Court may also recall that the Court, in the *Little* case, called attention to the fact that there were two lines of authorities dealing with the subject and cited cases exemplifying the two distinct doctrines. One of those doctrines, it held, was illustrated by such cases as

Marron v. U. S., 18 F. (2d) 218,

which was decided by this Ninth Circuit Court of Appeals. The Court, in the *Little* case, pointed out that the line of authorities exemplified by the *Marron* decision had held that since the enactment of the amendment of February 26, 1919, to Section 269 of the Judicial Code (28 USC, Sec. 391), the law is that "an appellant must establish affirmatively *both* substantial error *and* resulting prejudice." (Italics here and elsewhere are ours unless otherwise indicated.) That section of the Judicial Code now provides, it will be recalled, that:

> "On the hearing of any appeal * * * in any case, civil or criminal, the court shall give judg-

> ment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions *which do not affect the substantial rights of the parties.*"

The Court in the *Little* case then cites authorities illustrating the other line of decisions opposed to the doctrine exemplified by the holding of this Court in the *Marron* case, which hold that a verdict may be set aside or reversed on appeal *even though it does "not affirmatively appear that no prejudice resulted from the error."* We submit that an examination of the authorities will reveal, not only that this circuit is definitely committed to the former doctrine, as was pointed out by the Court in the *Little* case, but that the latter doctrine is absolutely unsound. Moreover, we submit that the *Little* case, which is cited by this Court as an authority upon which the majority based their conclusions, is not in fact an authority for such a holding as the majority have enunciated in the Chang case. We so state because the ultimate holding in the *Little* case, after considering the two lines of authorities, was that "where error occurs which *within the range of a reasonable possibility* may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict." It will be noted that as far as the Court goes is to hold that there must be "a reasonable possibility" that error may have influenced the minds of the jury before a reversal will be ordered. This reasonable possibility evidently must be apparent as an inference legitimately drawn from the facts presented. This Court in effect holds that to authorize

a reversal where error is shown the evidence need not be such as to permit an inference that there is a reasonable possibility that the verdict of the jury was affected thereby, but that on the mere showing of error, a presumption of prejudice automatically arises therefrom. We repeat that in our judgment neither the *Little* case nor any of the other cases following the doctrine of the *Little* case lays down any such rule. Moreover, as was pointed out by the Court in the *Little* case, this Circuit is definitely committed to the doctrine that an appellant may not secure a reversal merely on a showing of errors, but that he must show "both substantial error and resulting prejudice."

One of the first cases decided in this circuit to treat the subject under consideration, following the amendment to Section 269 of the Judicial Code, was

Simpson v. U. S., 289 Fed. 188.

In that case Mr. Justice Gilbert, in passing on the claim of error, said:

> "In reviewing a judgment in an appellate court the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial."

He cites Judge Baker of the Seventh Circuit Court of Appeals as having held in the case of

Haywood v. U. S., 268 Fed. 795,

in passing on the meaning of the amendment to the Judicial Code above referred to, that:

> "* * * we gather the congressional intent *to end the practice of holding that an error requires the reversal of the judgment unless the opponent can*

> *affirmatively demonstrate* from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial."

Mr. Justice Gilbert also quotes Judge Hook who, in the case of

Williams v. U. S., 265 Fed. 625,

held that:

> "Whether prejudice results from the erroneous admission of evidence at a trial is a question that should not be considered abstractly or by way of detachment. The question is one of practical effect, when the trial as a whole and all the circumstances of the proofs are regarded."

We ask that this Court weigh the language of Judge Baker in the *Haywood* case (supra), which met with their approval in the *Simpson* case (supra), in the light of the facts as brought out in the Chang case. We ask where the appellants have *"affirmatively demonstrated"* that they have been denied some substantial right whereby they were prevented from having a fair trial, as Judge Baker said was essential before there could be a reversal of a judgment of conviction.

Again, in the case of

Marron v. U. S., 18 F. (2d) 218,

which was cited in the *Little* case (supra), this Court, speaking by District Judge James, laid down the same

doctrine, quoting the language from the *Simpson* case that we have set out above, to the effect that in reviewing a judgment in an Appellate Court the burden is upon the plaintiff in error to prove that error in the admission of testimony was prejudicial. It will be observed that although Judge Rudkin dissented from the holding of the majority in the *Williams* case, he joined in the holding in the *Marron* case.

We next call attention to the decision of the Court in the case of

Lewis v. U. S., 38 F. (2d) 406.

In that case this Court, speaking by Mr. Justice Wilbur, again laid down the rule (p. 410), that *"reversal will not result from error unless from the whole record it appears to have been prejudicial"*, citing numerous cases in support of this ruling. In that holding Justice Rudkin and Dietrich concurred.

Again, in the case of

Miller v. U. S., 47 F. (2d) 120,

the Ninth Circuit Court of Appeals had occasion to pass upon a contention that the trial Court had erred in refusing a request for a number of particulars asked for by the defendant regarding certain allegations in the indictment. This Court, in holding that no error had been committed by the trial Court, said:

> *"In the absence of a showing that substantial rights were prejudiced* by the refusal of those portions of the requested bill of particulars which were denied, appellant has no ground for complaint as to the exercise of its discretion by the court below in this regard."

Finally we call attention to the case of

Coplin v. U. S., 88 F. (2d) 652,

decided by this Court in March of this year. The opinion was by Mr. Justice Garrecht, with whom concurred Justices Wilbur and Haney. In this case a judgment of conviction was affirmed. The Court called attention to the fact that notwithstanding the argument advanced by appellant, there had been "no showing of prejudicial error" resulting from the reception of the evidence objected to.

It will have been noted that of all of these cases decided by this Circuit in none of them is there the slightest intimation that prejudice will be presumed from error under any circumstances. On the other hand, the tenor of all of the opinions is to the effect that the burden is on an appellant at all times to show *"substantial error and resulting prejudice",* to quote the phrase employed in the *Little* case (supra), in commenting on the holding of this Court in the *Marron* case (supra).

We shall not take the time to make an exhaustive examination of the holdings of other Circuits. We will take the liberty, however, of quoting from a decision by the Eighth Circuit Court of Appeals in the case of

Furlong v. U. S., 10 F. (2d) 492.

Referring to Section 269 of the Judicial Code, as amended, and its provision that no judgment shall be set aside in any case for error unless "after an examination of the entire record it shall affirmatively

appear that the error complained of has resulted in a miscarriage of justice, the Court said (p. 495):

> "The object of the legislation is to abolish the old rule that when error is shown prejudice will be presumed. It creates a presumption in favor of the judgment, and requires the party seeking a new trial to convince the court upon the entire record that the judgment is wrong. If the judgment is right, the end of the law has been attained, and it ought not to be disturbed."

We submit that no affirmative showing of error, resulting in a miscarriage of justice, appears in the record in the instant case. It is only by indulging in an artificial presumption of error, which presumption does not grow out of, and is not based upon, any inference that may legitimately be drawn from the evidence, that a conclusion of prejudice can be reached.

The above consideration of the presumption of error as necessarily being prejudicial, is all based upon the assumption that the point was properly before this Court for consideration. We submit that such was not the fact. We will not take the time to cite authorities to the effect that a proper exception must be taken before this Court will consider assignments of error. The record in this case, as set out in the opinion, is to the effect that when the foreman of the jury appeared in the judge's chambers and informed the judge that the jury wished to be advised if the confession of one defendant in the case could be considered as evidence against the other, the attorney for appellants, instead of objecting to the request as improper, or suggesting

that all the jury be brought into Court to receive the instruction requested, by clear implication concurred in the propriety of the foreman's action. The first thing that happened after the foreman appeared and explained his mission, was the request of the appellants' attorney to have an instruction that was favorable to his client, given by the Court. It further appears from the record, as quoted in the opinion (p. 4), that the Court refused to give the instruction requested by appellants' counsel, and *"over defendant's exception adhered to the instruction given* to the jury in the course of the trial". By no reasonable construction can this language be regarded as signifying that counsel for appellants excepted to anything other than the Court's refusal to give the instruction that counsel asked for, and to the Court's reiteration of the instruction that he had given during the course of the trial. If there were even any doubt as to the meaning of the language employed by counsel in taking this exception, we submit that in view of the tenor and intent of Section 269 of the Judicial Code with respect to the burden on an appellant to make out a showing that will justify a reversal, this Court cannot reasonably construe the language of counsel for appellants in such a manner as to permit the consideration by this Court of the error complained of on this appeal.

Moreover, even though the exception relied on by appellants were sufficient, we submit that, as pointed out by Mr. Justice Wilbur, there was no assignment of error to the giving of the instruction to the foreman in the absence of the rest of the jury. The assignment

was only to the refusal of the Court to give the particular instruction desired by counsel and to the Court's "adherence" to the instruction given on the subject during the trial.

It has long been the settled rule in this Circuit that, as stated by the Court in *American Surety Co. v. Fisher Warehouse Co.,* 88 F. (2d) 536, 538, "if the assignments are so indefinite that the particular error is not set forth, the assignments will be disregarded". The purpose of requiring assignments and of requiring that they be clear and explicit, is, as was said by this Court in the same case, quoting from a Supreme Court decision "to enable the Court as well as opposing counsel readily to perceive what points are relied on". (Citing numerous cases.)

We have in mind that this Court, under its rule, may in its discretion notice a plain error not assigned. We are not aware of any federal decision that adequately treats the question of what constitutes plain error. A statute involving a similar principle has, however, been construed on numerous occasions by one of our State Courts. Texas has long had a statute upon its books authorizing an Appellate Court to consider errors "either assigned or apparent upon the face of the record".

In the case of *Searcy v. Grant,* 37 S. W. 320, the Supreme Court of Texas had occasion to pass upon this provision of the law. Plaintiff had recovered a judgment which had been reversed by the Court of Civil Appeals. The Supreme Court held that the

Court of Civil Appeals had erred in the action taken by it because the error relied upon had neither been assigned by the appellant, nor was it apparent on the face of the record. Said the Supreme Court, page 322:

> "An error, not assigned, of which the Court of Civil Appeals may take cognizance must be an error of law apparent on the record which *necessarily* affected the result, and it must *plainly appear* from the record that, in the absence of such error, the result might have been different."

Again, in the comparatively recent case of *Texas & P. Ry. Co. v. Lilly,* 23 S. W. (2d) 697, it appears that the Court of Civil Appeals had certified to the Commission of Appeals of Texas the question whether, in the absence of assignments of error filed in the Court below, the Court of Civil Appeals was authorized to take notice of the error complained of. Said the Texas Commission of Appeals in its consideration of the language of the statute authorizing a consideration of apparent errors:

> "One of the first cases in which this statute was considered is Houston Oil Co. v. Kimball, 103 Tex. 94, 122 S. W. 533, 537, where Justice Brown, later Chief Justice, said: 'The language, "apparent upon the face of the record", indicates that it is to be seen upon looking at the face of the record (that is, the assignment itself), the fact pointed out by it must show a good and sufficient ground for the court to interfere to prevent injustice being done to one of the parties. Perhaps the best expression is that *it must be a funda-*

mental error, such error as being readily seen lies at the base and foundation of the proceeding and affects the judgment necessarily.'

"The latter part of this quotation is indeed the best expression that has been made or can be made of the matter. As pointed out in the opinion under review, the statute does not mean that any error which can be ascertained by looking into the record, including the evidence, will constitute that error 'apparent upon the face of the record'. This would be to make all errors fundamental errors, for every error may be made to appear by an examination of the entire record. (Italics ours.)

The Supreme Court of Texas, by Chief Justice Cureton, adopted the opinion of the Commission of Appeals.

The reasoning of the Texas Courts should make it apparent that the error complained of by appellants in the instant case is not such plain error as will justify this Court in considering it in the absence of a sufficient assignment.

Even if under ordinary circumstances, the error that is now complained of, had been assigned in proper language, still another reason presents itself why this Court may not consider it. That reason is, as was likewise pointed out by Judge Wilbur, that the error was invited by the defendants in requesting an instruction opposite in effect to the one given by the jury. If the Court had *first* given an unfavorable instruction in response to the request of the foreman, and counsel

for appellants, for purposes of the record, had then requested the instruction which the record shows he did ask for, the situation presented might be analogous to the situation that frequently arises where a witness has been examined in a form that is regarded by opposing counsel as improper. It is generally held that under those circumstances he does not waive the error by cross-examining on the objectionable matter. (See *Fernandez v. Western Fuse Co.,* 34 Cal. App. 420, citing cases in support, and *Jameson v. Tully,* 178 Cal. 380, 384.)

But no such situation presents itself here. It appears from the record that the original request that the instruction asked for by the foreman be given, was the request of appellants' counsel.

Under the circumstances the well-settled rule, as exemplified in the case of *Shields v. U. S.,* 17 Fed. (2d) 66, 69, is applicable. Said the Court in that case:

> "The justified reliance of court on the request of counsel, avoidance of abortive mistrials, and the timely administration of a court's work, based on the verdict of a jury which had evidence to support it, all unite in making the case one where with one breath a court cannot be asked by counsel to take a step in a case, and later be convicted of error because it has complied with such request, for, as is said in 17 Corpus Juris, 373, 374, *'a defendant in a criminal case cannot complain of error which he himself has invited.'* "

There is one other and concluding point that we wish to take up. This Court held in its opinion in the

instant case (p. 6) that "appellants were entitled to be personally present at every stage of the trial". The Court concedes that appellants could have waived that right by voluntarily absenting themselves from the trial, but held that that exception had no application under the circumstances presented. We submit that the fact that a defendant in a criminal case is not personally present at every stage of his trial, is no longer reversible error, even though the defendant may not have voluntarily absented himself. In our opinion this conclusion necessarily follows from the holding of the Supreme Court in the comparatively recent case of *Snyder v. Massachusetts,* 291 U. S. 97. In that case it was urged that the defendant had been improperly convicted of the charge of murder that had been made against him because the jurors had been taken to visit the scene of the crime accompanied by the judge, the counsel for both parties and the Court stenographer, but that the defendant's request to be permitted to attend the view was denied. The original orthodox rule on this subject was expressed in the minority opinion of Mr. Justice Roberts. Said Mr. Justice Roberts (p. 128):

> "Our traditions, the Bills of Rights of our federal and state constitutions, state legislation and the decisions of the courts of the nation and the states, unite in testimony that the privilege of the accused to be present throughout his trial is of the very essence of due process. The trial as respects the prisoner's right of presence in the constitutional sense, does not include the formal procedure of indictment or preliminary steps antecedent to the hearing on the merits, or stages

> of the litigation after the rendition of the verdict, but does comprehend the inquiry by the ordained trier of fact from beginning to end."
>
> "Accordingly", said the learned Justice, "the Courts have uniformly and invariably held that the Sixth Amendment, as respects Federal trials, and the analogous declarations of right of the state constitutions touching trials in state courts, secure to the accused the privilege of presence at every stage of his trial."

He pointed out (p. 131), that although it had been urged that the prisoner's privilege of presence was for no other purpose than to safeguard his opportunity to cross-examine adverse witnesses, it in fact went deeper and secured his right to be present at every stage of the trial. Although he conceded that there was a lack of unanimity in the authorities as to whether or not a view of the premises formed a part of the trial, he contended that the weight of authority was to the effect that it did constitute a part of the trial, and for that reason a defendant who so desired was entitled to be present. He concluded that the defendant had been deprived of a constitutional right in not being permitted to be present at the view and that, therefore, the judgment should be reversed. It is apparent that this Court has based its opinion and holding in the instant case, in so far as the point under consideration is concerned, upon the same line of reasoning that was advanced by Mr. Justice Roberts and his associates in the *Snyder* case.

Notwithstanding the reasoning of Justice Roberts with whom concurred Justices Sutherland, Brandeis

and Butler, the majority of the Court in the *Snyder* case held otherwise. The majority, speaking by Mr. Justice Cardozo held that the fact that the defendant had not been permitted to attend at the view did not constitute reversible error. The majority opinion conceded (p. 105) for purposes of the case that in a prosecution for a felony the defendant has the privilege under the 14th Amendment, to be present in his own person *"whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge"*. As pointed out by the Court, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the Federal Courts, and in prosecutions in the State Courts is assured very often by the Constitutions of the States and, possibly, by the 14th Amendment as well. The Court also intimated that the same right might exist in connection with the examination of jurors and the summing up of counsel, because it would be in defendant's power, if present, "to give advice or suggestion or even to supersede his lawyers altogether and to conduct the trial himself". As the Court further pointed out (p. 106):

> "Nowhere in the decisions of this Court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. What has been said, if not decided, is distinctly to the contrary."

At a bare inspection of premises with nothing more, continues the opinion, there is nothing that a defend-

ant could do if he were there and almost nothing that he could gain.

The Court quotes (p. 112) an early California decision, *People v. Bonney,* 19 Cal. 426, 446, to the effect that:

> "We do not see what good the presence of the prisoner would do as he could neither ask nor answer questions nor in any way interfere with the acts, observations, or conclusions of the Jury."

The Court further on in its opinion (p. 114) points out that a defendant in a criminal case must be present during a trial when evidence is offered because the opportunity must be his to advise with his counsel and cross-examine his accusers.

With reference to the problem which has troubled the Courts as to whether a view is part of the trial or is merely to enable the jury to better understand the testimony introduced, the Court succinctly stated (p. 121) that whichever view is taken of a view of premises, "its inevitable effect is that of evidence no matter what label the judge may choose to give it". The majority opinion concluded with this sentence, to which we respectfully call this Court's attention:

> "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if *gossamer possibilities of prejudice* to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

We submit that the logic and reasoning of the Court in the *Snyder* case, conclusively disposes of the hold-

ing of this Court in the instant case to the effect that a defendant in a criminal case who is charged with a felony is in all cases "entitled to be personally present at every stage of the trial". It is obvious from the language used by the Court in the majority opinion that whether or not a defendant is entitled to be present at a certain stage of the trial depends upon whether or not his presence can be of any advantage or assistance to him. We submit that the presence of a defendant at the time a Court is giving his instructions, and particularly at a time when the Court is merely repeating an isolated instruction upon a point upon which he has already instructed the jury, could be of no assistance to him. It is obvious that he could make no pertinent suggestion to his counsel that could materially affect the situation.

If our conclusion is sound, as we believe it to be, it must necessarily follow that the holding of the majority of the Court in the instant case, that a defendant is entitled to be personally present at every stage of the trial is not in accord with the position taken by the Supreme Court in the *Snyder* case.

We cannot better conclude this petition, in our opinion, than by quoting the footnote appended to its opinion by the Court in the *Little* case (supra), in which footnote the Court quotes from the *Snyder* case as follows:

> "In *Snyder v. Massachusetts,* 291 U.S. 97, 113, 54 S.Ct. 330, 335, 78 L. Ed. 674, 90 A.L.R. 575, after finding that no prejudice resulted from the defendant's absence when the scene of the crime was viewed, the Supreme Court held that *'the*

*least a defendant must do * * * is to show that* in the particular case in which the practice is exposed to challenge, *there is a reasonable possibility that injustice has been done.'* "

We submit that in the instant case the burden was upon the appellants to prove that there was a "reasonable possibility that injustice has been done" to them. We further submit that they have failed to show affirmatively that there is such a reasonable possibility, or to show anything more than, to use the phrase of Mr. Justice Cardozo, "a gossamer possibility", and that this Court erred in reversing the judgment and overthrowing the verdict that was rendered in the lower Court. We respectfully ask that a rehearing in the case be granted.

Dated, San Francisco, California,
August 25, 1937.

Respectfully submitted,

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